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April 5, 1999

Office of the Fiscal Assistant Secretary  
U.S. Department of the Treasury  
Room 2112  
1500 Pennsylvania Ave., N.W.  
Washington, DC 20220

Re: Advanced Notice of Proposed Rulemaking  
Possible Regulation Regarding Access to Accounts  
at Financial Institutions Through Payment Service Providers  
RIN 1505-AA74

Dear Sir or Madam:

I have enclosed the Comments of Professors James Brown, Donald Clifford and myself in regard to the above ANPRM.

Sincerely,

Mark E. Budnitz  
Professor of Law

MEB/kb  
Enclosures

## Comments to the Treasury

Professors Mark E. Budnitz, Donald F. Clifford & James Brown<sup>1</sup>

### Advance Notice of Proposed Rulemaking “Possible Regulation Regarding Access to Accounts at Financial Institutions Through Payment Service Providers”

This Comment is limited to the narrow question of whether Treasury has the authority to issue regulations prohibiting regulated financial institutions from establishing voluntary accounts whereby recipients of electronic federal payments can access their funds only through prearranged partnership accounts<sup>2</sup> with payment service providers.<sup>3</sup> In our opinion, Treasury has clear authority to promulgate such a regulation.

The applicable statutory provision states that the “Secretary of the Treasury may prescribe regulations that the Secretary considers necessary to carry out this section.” 31 U.S.C. § 3332(i)(1). The Supreme Court has long and consistently held that where Congress empowers an agency to issue regulations which are necessary to carry out a statute, “the validity of a regulation promulgated thereunder will be sustained so long as it is ‘reasonably related to the purposes of the enabling legislation.’” *Mourning v. Family Publications Service*, 411 U.S. 356,

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<sup>1</sup> Mark E. Budnitz is a Professor of Law at Georgia State University College of Law. He is the author of several law review articles on the the Uniform Commercial Code, Electronic Benefits Transfer, and electronic commerce. He is co-Chair of the Working Group on Consumer Protection, Electronic Commerce Subcommittee, Cyberspace Law Committee, American Bar Association. Donald F. Clifford is the Aubrey Brooks Professor of Law at the University of North Carolina School of Law. He teaches Commercial, Corporate, and Consumer Law and is the author of articles in those areas. James Brown is an Associate Professor and the Director of the Center for Consumer Affairs at the University of Wisconsin-Milwaukee. He is a Fellow on the Consumer Financial Services Committee, Section on Business Law, American Bar Association.

<sup>2</sup> The term “partnership accounts” is used to refer to federal funds which are transferred to a financial institution, followed by a transfer into an account in the name of the payment service provider, from which the recipient accesses funds.

<sup>3</sup> This Comment adopts the terms and the definitions used in the ANPRM. The ANPRM defines payment service providers as including check cashers, currency dealers, exchangers of money, and money transmitters.

369 (1973), quoting *Thorpe v. Housing Authority*, 393 U.S. 268, 280-81 (1969). Moreover, the Court has applied this standard to official staff interpretations as well as agency regulations. *Ford Motor Credit Co. v. Millhollin*, 444 U.S. 555, 568 (1980)(judges should defer to the FRB staff's expertise as long as the agency's "lawmaking is not irrational.").

A regulation prohibiting partnership accounts clearly would be reasonably related to the purposes of the legislation. In fact, *permitting* partnership accounts is contrary to the purposes of the legislation. The statute specifically requires the Secretary to draft regulations which "shall ensure that individuals required...to have an account at a financial institution...will have access to such an account at a reasonable cost; and...are given the same consumer protections...as other account holders at the same financial institution." 31 U.S.C. § 3332(i)(2). There is absolutely no differentiation in the statute between accounts which recipients choose for themselves, and accounts which Treasury provides for them. The statute clearly provides that, whichever type of account the recipient has, the regulations are absolutely required in all cases to "ensure" that recipients have access at a reasonable cost and the benefit of the "same" consumer protection which others at that "same" financial institution are provided. The ANPRM itself describes in great detail the likelihood that recipients accessing their funds through payment service providers will be subject to higher costs and fewer consumer protections.

The Supreme Court has declared that judges should defer to agencies to which Congress has granted broad authority. The Court's deference is to permit the agency to do what is necessary to effectuate the purposes of the legislation. The statute specifically requires the Secretary to write regulations which will "ensure" recipients are protected. "The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989), quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982).

The plain meaning of this statute is to give the Secretary authority to protect recipients. This is demonstrably consistent with the intentions of Congress. Issuing a regulation prohibiting payment service providers from establishing partnership accounts is not merely "reasonably related" to carrying out the goals of the law, but in fact is necessary to achieve them and is clearly authorized by the statute.

Although it is unnecessary to resort to legislative history when a statute is clear and unambiguous, that history fully supports Treasury's issuing a regulation prohibiting partnership accounts. Representative Horn was a member of the Committee which recommended this legislation. Rep. Horn made a statement clarifying the legislative intent, saying that Congress expected "Treasury to work vigorously to accommodate the *needs* of the unbanked recipients through such means as:...(2) implement through the private sector consumer owned *bank*

*accounts.*"<sup>4</sup> Treasury is required to focus on the needs of recipients who are unbanked. The legislative intent is to provide them with bank accounts. Some of those needs of consumers are specifically identified in the statute: recipients' need to have a bank account which is available at a reasonable cost and affords the same consumer protection as other customers at that bank. The partnership account with payment service providers runs directly counter to the needs of consumers. The consumer with that type of account does not really have a bank account: the bank is merely a conduit. In addition, payment service companies provide financial services at a higher cost and are not subject to the same consumer protection laws as banks. Partnership accounts consequently conflict with Congressional intent as expressed in the legislative history.

Finally, partnership accounts are contrary to public policy. The ANPRM itself acknowledges that payment service providers are largely unregulated and charge high fees.<sup>5</sup> Deposits are not federally insured. These companies are not expected to provide adequate disclosures. They are, however, expected to require recipients to withdraw the entire amount of the federal monthly payment rather than a portion, a frighteningly dangerous action for the recipient, and seemingly directly contrary to one of the most important of the many putative benefits of ETAs to recipients. The ANPRM states that the ETA account is designed to be "safe, reliable and economical." In sharp contrast, Treasury acknowledges in the ANPRM that the partnership accounts will be none of these.

Treasury clearly is authorized to prohibit partnership accounts. Not only is that prohibition permitted by the statute, but it also is consistent with the stated objectives of the statute, the legislative history, and public policy.

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<sup>4</sup> 142 Cong. Rec. H4090 (emphasis added).

<sup>5</sup> See Squires & O'Connor, "Fringe Banking in Milwaukee: The Rise of Check Cashing Businesses and the Emergence of a Two-Tiered Banking System," 34 Urban Affairs Rev. 126 (1998)